United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7316

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

ROGER DiLEO,
Appellant

vs.

RICHARD GREENFIELD ET AL,
Appellees

Docket No. 75-7316

Appellees' Brief on Appeal
from the District Court for Connecticut

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STATEMENT OF THE ISSUES

I. Should this appeal be dismissed because the Appellant has demanded and received from the Appellees payment of the Judgment awarded below, together with interest and taxable costs.

II. Is the "other due and sufficient cause" standard for teacher terminations contained in Sec.10-151 (b) (6) Conn. Gen. Stats. so impermissibly vague that the statute must be automatically invalidated as void for vagueness.

STATEMENT OF THE CASE

This action was brought by Plaintiff, a tenured teacher in the Bloomfield public school system, seeking money damages and reinstatement following his termination by the Board of Education on August 1, 1973.

In ruling upon cross motions for Summary Judgment, the District Court, Clarie, C. J. held (Doc. 16) that the admission of hearsay evidence by the Board at the hearings leading to Plaintiff's termination violated Plaintiff's rights of due process. The Court denied damages and reinstatement and ordered a new hearing by the Board, with the exclusion of hearsay testimony.

Pursuant to the order of the Court, de novo hearings were held on May 20, 1974 and June 5, 1974 by the Board, consisting in part of the named Defendants herein, and other newly elected members; two members had been elected to the Board in the period between the original hearings and the Court-ordered hearing.

After the Court-ordered rehearing, the Board again terminated the services of the Plaintiff. On renewed cross motions for Summary Judgment, the District Court awarded Plaintiff damages for the school year, 1973-74, as mitigated, holding that he was entitled to such damages from the date of his original discharge at the end of the 1973 school year to June 18, 1974, the date of his lawful discharge. (Doc. 20, Pg. 27). The Court rejected Plaintiff's claim that the statute, Sec. 10-151 (b) (6) upon which Plaintiff's termination was based, was unconstitutionally vague. (Doc. 20, Pgs. 24-25). After a hearing in damages, the Court ruled that because of Plaintiff's lack of reasonable diligence in attempting to find other employment during part of the contract period, the total salary for the period from the original termination until the second termination should be reduced by fifty per cent (50%).

(Doc. 21, Pgs. 6-7). The Court found that Plaintiff should recover $6327.00, with interest from the date of entry of summary judgment, plus taxable costs. (Doc. 21, Pg. 7). On May 1, 1975, at the request of Plaintiff's counsel, counsel for the Defendants forwarded to Plaintiff's counsel a check in the amount of $6416.44, representing the amount of the Judgment and legal interest through May 1, 1975. This check was made payable to Plaintiff and to Karl Fleischmann, Atty. An additional check was forwarded to Plaintiff's counsel in payment of his bill of costs. Both checks were received by Plaintiff's counsel and deposited in checking accounts maintained by him.

Judgment was entered by the District Court on April 28, 1975, as follows: It is accordingly ORDERED and ADJUDGED that the Plaintiff recover the sum of $6327.00 together with statutory interest from February 4, 1975, and taxable costs. (Doc. 22). On May 27, 1975, Notice of Appeal was filed by Plaintiff with the District Court, appealing from the final judgment. (Doc. 26). On June 6, 1975, the Defendants moved to dismiss the appeal on the grounds that Plaintiff-Appellant's acceptance of the amount of the judgment and interest constituted full satisfaction of said judgment. Argument on this motion has been consolidated with the argument of the appeal.

ARGUMENT

ACCEPTANCE OF PAYMENT BY THE PLAINTIFF CONSTITUTED FULL SATISFACTION OF THE JUDGMENT AND PRECLUDES APPEAL FROM SAID JUDGMENT.

The Judgment of the District Court from which this Appeal has been taken, is a Judgment for money damages, and interest thereon, which sum has been accepted by the Plaintiff. Plaintiff's counsel's oral undertaking to Defendants' counsel that if the Court should require the return of these funds as a condition for maintaining the appeal, he would do so promptly, was a unilateral undertaking. Defendants' counsel has consistently maintained that acceptance of such payment constituted full satisfaction of said Judgment. The Judgment of the District Court was based upon inseparable claims from which an appeal is being taken by the party who has already received the benefit of such Judgment. The Complaint filed by Plaintiff contained no allegation of a liquidated sum due to him, and the money which he demanded and received from the Appellee was not absolutely owing to him as a matter of law other than by reason of the Judgment of the District Court.

In Spencer v. Babylon R. Co., 2 Circ., 250 F. 24, 26, the Court held

> The general rule is well settled that unless there is a separable controversy, or unless there is some sum to which the appealing party is entitled in any event, he may not accept the benefit of the decree and later appeal.

While Defendants concede that an express undertaking of the nature involved in Wilson v. Pantasote Company, 254 F 2d 700 (C A 2d, 1958) was not made in the case at bar, it is however, a fact that when Plaintiff's counsel requested

payment of the Judgment, Defendants' counsel demanded a Satisfaction of Judgment from Plaintiff and was of the impression that such would be forthcoming. Based upon such understanding, Defendants' counsel, by letter of May 1, 1975, advised Plaintiff's counsel that he was requesting checks in payment of the Judgment and the Bill of Costs and at the same time requested the Satisfaction of Judgment. Had Defendants been aware that a Satisfaction of Judgment would not be forthcoming and that Plaintiff intended to Appeal, payment of the Judgment would not have been made at that time.

In Wilson, Lumbard, J., citing Spanel v. Bertman, 7 Cir., 1948, 171 F 2d. 513, certiorari denied 333 U.S. 968; in re Electric Power and Light Corporation, 2 Cir., 1949, 176 F 2d 687, 690; Colquette v. Crossett Lumber Co., 8 Cir. 1945, 149 F. 2d 116; and Allen v. Bank of Angelica, 2 Cir., 1929, 34 F 2d. 658, 659, held, where the Appellant had accepted the advantages of the judgment and then appealed, that

> The appellant is estopped by his acceptance of the amount of the judgment and the appeal must be dismissed.

In Spanel v. Bertman, supra, the court said

> the question for decision is whether the plaintiff, after accepting and satisfying this part of the judgment favorable to him is precluded from pursuing an appeal from other portions of the judgment decided against him. . . .
>
> No rule of law is better settled than that any litigant who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its

> burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court.

The Appellant can hardly claim that the acceptance of $6416.44 does not constitute acceptance of the benefits or a substantial part of the benefits of the Judgment.

In Colquette v. Crossett Lumber Co., supra, the Court, citing Kaiser v. Standard Oil Co. of New Jersey, 5 Cir., 89 F. 2d 58, 59 and Altman v. Shopping Bldg. Co., 8 Circ., 82 F2d 521, 527, held the rule to be firmly established, saying

> Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed an abandonment of the other.

In Credit Bureau of San Diego, Inc. v. Petrasich, Cir. 9 (1949), 118 F2d 470, and cited in Moore, Federal Practice & Procedure, Vol II, Section 28.05 (3), where a judgment was entered in two parts (an award of monetary damages and a permanent injunction), appellant who voluntarily accepted and retained the amount awarded to it in the first part of the judgment and seeking to appeal from that part of the judgment respecting the injunction was held precluded from appealing the second part of the judgment.

Appellant, in his argument, does not question the correctness of the result below as to the year 1973-74 and does not question the correctness of the Court's ruling on the admissibility of hearsay, but does assert that there was error in sustaining the constitutionality of the statute upon which his termination rests for the next school year. (emphasis added) If the statute is unconstitutionally vague as Appellant claims it to be, then the removal of hearsay evidence would not eliminate

the claimed unconstitutional vagueness. Appellant is indeed involved in the inconsistency mentioned in the Allen case between accepting the view of the law upon which the judgment was based insofar as 1973-1974 was concerned, while challenging it on appeal with respect to the school year 1974-75. The District Court in its Final Ruling on Cross Motions for Summary Judgment rejected Appellant's claims of unconstitutional vagueness in its consideration of the termination proceedings both for the 1973-74 school year and the 1974-75 school year. Query whether or not Appellant would still be arguing the constitutionality of the statute if the Court below had not mitigated the damages.

The facts of this case are not distinguishable from those in Allen and there is no compelling reason for this Court to reverse its prior decisions. Appellant has indeed made his own bed, and now he must sleep in it. The Motion to Dismiss the Appeal should be granted.

THE PROVISION FOR TERMINATION OF A TENURED TEACHER FOR "OTHER DUE AND SUFFICIENT CAUSE" SET FORTH IN SEC. 10-151 (b) (6) CONN. GEN. STATS. IS NOT UNCONSTITUTIONALLY VOID FOR VAGUENESS AND A TERMINATION BASED ON SUCH PROVISION IS NOT A DENIAL OF DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT.

The legislature, in Sec. 10-151 (b) (quoted in the margin)* has listed five specific reasons, or causes, for the dismissal of a teacher who has acquired tenure.

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*Sec. 10-151 Employment of teachers. Notice and hearing on termination of contract.

(b) Beginning with and subsequent to the fourth year of continuous employment of a teacher by a board of education, the contract of employment of a teacher shall be renewed from year to year, except that it may be terminated at any time for one or more of the following reasons: (1) Inefficiency or incompetence; (2) insubordination against reasonable rules of the board of education; (3) moral misconduct; (4) disability, as shown by competent medical evidence; (5) elimination of the position to which the teacher was appointed, if no other position exists to which he may be appointed if qualified; or (6) other due and sufficient cause; provided, prior to terminating a contract, a board of education shall give the teacher concerned a written notice that termination of his contract is under consideration and, upon written request filed by such teacher with such board within five days after receipt of such notice, shall within the next succeeding five days give such teacher a statement in writing of its reasons therefor. Within twenty days after receipt from a board of education of written notice that contract termination is under consideration, the teacher concerned may file with such board a

The list, however, is not exhaustive as the legislature realized that it could not have provided an exhaustive list of justifiable reasons for terminating a teacher. Any attempt by the legislature to do so would have produced only an exclusive list which would have precluded school boards from dismissing teachers for valid causes not listed in the statute. While it is the statutory obligation of each town to provide quality education, it is the local board of education which formulates policy and structures the school programs to insure that the educational interests of the State are best served. With this in mind, the legislature has wisely provided in 10-151 (b) that a teacher's contract may also be terminated for "other due and sufficient cause" leaving the determination of what constitutes such other due and sufficient cause to the agency closest to the educational process, the local board of education. Either the legislature must face the impossible task of specifying every possible legal cause for termination, or it must leave to the discretion of the local board the determination of the kind of teacher performance that is detrimental to the educational process.

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written request for a hearing, which such board shall hold within fifteen days after receipt of such request. Such hearing shall be public if the teacher so requests or the board so designates. The teacher concerned shall have the right to appear with counsel of his choice at such hearing, whether public or private. A board of education shall give the teacher concerned its written decision within fifteen days after such hearing, together with a copy of a transcript of the proceedings, which shall be furnished without cost. Nothing herein contained shall deprive a board of education of the power to suspend a teacher from duty immediately when serious misconduct is charged without prejudice to the rights of the teacher as otherwise provided in this section.

The term "cause" has been judicially defined as follows:

> Cause for removal of an officer means some substantial shortcoming which renders continuance in office or employment in some way detrimental to discipline and efficiency of service and something which the law and sound public opinion recognize as a good cause for his no longer occupying the place. Joyce v. Board of Education of Chicago, 325 Ill. App. 543 (1945).

> While the sufficiency of the cause is for the board to decide, the question whether the cause assigned constitutes of itself, a ground for discipline or removal is a question for the Court. Riley v. Board of Police Commissioners, 147 Conn. 113, 118 (1960).

It is clear from a reading of the cases which have defined the term "cause" as it applies to the termination of a teacher's employment, that the cause must be one related to the performance of professional duties, and one which evidences a serious shortcoming affecting that performance. Appellant has never claimed that any attempt was made to inhibit his freedom of speech or expression. The phrase "other due and sufficient cause" as it appears in 10-151 (b) is not capable of application which would have the effect of inhibiting the exercise of rights granted by the First Amendment.

While it is conceded that the phrase "other due and sufficient cause" is vague, the test is whether it is impermissibly vague.

To make such a determination would require a finding that the legislature has the foresight to have listed specifically all of the countless possible legal causes for teacher dismissal.

In the recently decided Supreme Court case of Arnett v. Kennedy, 416 US 134 (April 16, 1974), a non-probationary government employee was discharged after receiving written notice of charges against him, including the charge that the employee, without proof and recklessly, stated that his supervisor had attempted to bribe a third party. Discharge was effected pursuant to the provisions of the Lloyd-LaFollette Act (5 USCS Sec. 7501) which authorized removal or suspension without pay of a non-probationary government employee "only for such cause as will promote the efficiency of the service". In holding that the provision of the Act was not void for vagueness, Mr. Justice Rehnquist, speaking for the majority, said

> We hold the standard of "cause" set forth in the Lloyd-LaFollette Act as a limitation on the Government's authority to discharge federal employees is constituionally sufficient against the charges both of overbreadth and of vagueness.
>
> There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibition may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with without sacrifice to the public interest . . . the general class of offense to which . . . the provisions are directed is plainly within their terms . . . and they will not be struck down as vague, even though marginal cases could be put where doubts might arise. CSC v. Letter Carriers, 414 US 548, 578-579, 37 L Ed 2d 796,

93 Supreme Court 2880 (1973); United States v. Harriss, 347 US 612, 618, 98 L Ed 989, 74 S. Ct. 808 (1954).

Arnett, citing Colten v. Kentucky, 407 US 104, 110 (1972) further held

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principal designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

While Colten dealt with "vagueness" in a criminal statute, both Arnett and the case at bar deal with a statute with civil sanctions. All other factors being equal, it is probable that a statute imposing criminal sanctions will be looked at more severely than one whose operation is of less drastic effect and the same principle should apply when all other factors are unequal as they always are. Amsterdam, The Void-For Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1961) p. 70, n.16. The standards of certainty in statutes punishing for offenses are higher than in those depending primarily upon civil sanctions for enforcement. Winters v. New York, 333 US 507,515.

It is indicative that with the exception of Small v. American Sugar Ref. Co., 267 US 233, a contract case involving enforcement of the Lever Act of 1917, no vagueness attack on a non-criminal statute has succeeded. Amsterdam, The Void-For Vagueness Doctrine in the Supreme Court, supra.

In Arnett, the Court further held

> Because of the infinite variety of factual situations in which public statements by government employees might reasonably justify dismissal for "cause" we conclude that the Act describes as explicitly as is required the employee conduct which is grounds for removal.

The essential fairness of this broad and general removal standard and the impracticability of greater specificity were recognized by Judge Leventhal in Meehan v. Macy, 129 US App. DC 217, 230, 393 F2d 822, 835 (1968) modified, 138 US App. DC 38, 425 F2d 469, aff'd en banc, 138 US App. DC 41, 425 F 2d 472 (1969) where the Court held

> It is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include "catchall" clauses prohibiting employee "misconduct", "immorality" or "conduct unbecoming".

In Parker v. Levy, 42 US Law Week 4979 (decided June 18, 1974), the Supreme Court was again faced with the "void for vagueness" argument. Mr. Justice Rehnquist, in delivering the opinion of the Court, cited United States v. National Dairy Corp., 372 US 29, 32-33 (1963), holding that

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. Jordan v. DeGeorge, 341 US 223, 231 (1951) and United States

> v. Petrillo, 332 US 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. United States v. Rumely, 345 US 41 (1953) Cromwell v. Benson, 285 US 22, 62 (1932); see Screws v. United States, 325 US 91 (1945).

Once again in Parker, the Supreme Court restated its position that void for vagueness will be considered by the Court only in cases of statutes imposing criminal sanctions rather than civil sanctions. Justice Rehnquist emphasized the position of the Court in further holding

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harriss, supra.

While many of the cases cited by Appellant in his brief deal with First Amendment rights, he has admitted in his brief, p. 13, that no attempt was made to inhibit his freedom of speech. Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech, where a man may be the less required to act at his peril, because the free dissemination of ideas may be the loser. Smith v. California, 361 US 147, 150-151 (1959). The vagueness analysis has generally been limited to attach either on state criminal statutes when the vice of imprecision is the failure to give notice of the conduct to be avoided, e.g., International Harvester Co. v. Kentucky, 234 US 216 (1914) or on regulatory statutes whose vague and indefinite language prevent an unconstitutional state intrusion into areas of private liberties specifically protected by the Bill of Rights, e.g., Joseph Busatyn, Inc. v. Wilson, 343 US 495 (1952).

In construing the statutory words "other good and just cause", the courts have held that it may be a cause not resulting in the grounds enumerated in the statute, and that it includes any case which bears a reasonable relation to the teacher's fitness or capacity to discharge the duties of the position. 68 Am. Jur. 2d 514, 110 ALR 791, 804. The Supreme Court of Indiana has twice considered the "or other good and just cause" provision of its teacher termination statute. In McQuaid v. State ex rel Sigler, 211 Ind. 595, 6 N.E. 2d 547, the Court held

> The "good and just" cause contemplated by the provisions of the Teacher's Tenure Act which stated that the contract of a permanent teacher may be cancelled for incompetency, insubordination, neglect of duty, immorality, justifiable decrease in a number of teaching positions,or other good and just cause, may be a cause not resulting in incompetency, insubordination, neglect of duty or immorality. Such "good cause" includes any ground put forward by a school committee in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the committee's task of building up and maintaining an efficient school system.

In Stiver v. State, 211 Ind. 380, 1 N.E. 2d 1006, reh. den. 211 Ind. 387, 7 N.E. 2d 183, the Indiana Supreme Court held that

> under a tenure statute wherein a teacher may be removed for "other good and just cause", a teacher may be removed for lack of cooperation, ability and willingness to co-operate being reasonably related to the fitness

or capacity of a teacher for the performance of his duties.

Appellant here has asserted a property interest protected by procedural due process under the Fourteenth Amendment. There has been no claim of inhibition of First Amendment rights. In Martinez v. Texas State Board of Examiners, 476 SW 2d 400, 404, a physician's license to practice was revoked when he was charged with "acts of such a nature as to constitute grossly unprofessional conduct likely to deceive or defraud the public". The appellant-doctor claimed the statute was unconstitutionally vague. The Texas Supreme Court, while holding the statute to be penal in nature, as it deprived appellant of a valuable property right, held that the United States Supreme Court has used the doctrine of unconstitutional vagueness almost exclusively to protect encroachment upon a First Amendment right rather than the property right asserted here and cited Smith v. California, supra and Amesterdam, The-Void-For Vagueness Doctrine in The Supreme Court, supra.

CONCLUSION

Appellant, having accepted payment of the damages awarded by the Judgment of the District Court is precluded from appealing said Judgment and his appeal should be dismissed. In the alternative, Appellant having been lawfully terminated pursuant to the procedures established by 10-151 of the Connecticut General Statutes and in accordance with the guidelines set by the District Court, the judgment should be affirmed.

Dated at Hartford, Connecticut, September 22, 1975.

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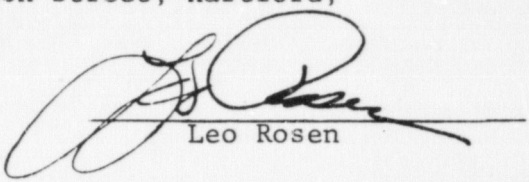
I hereby certify that two (2) copies of this brief have been mailed to Karl Fleischmann, Esq., 60 Washington Street, Hartford, Connecticut.



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